PANTAI BAYU EMAS SDN BHD & ORS A

v.

SOUTHERN BANK BHD

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
ZAINUN ALI JCA
HASAN LAH JCA
[CIVIL APPEAL NO: Q-02-589-2007]
15 OCTOBER 2008 C

CIVIL PROCEDURE: *Parties - Substitution of plaintiff - Bank with vesting order - Legal effect of vesting order made under s. 50 Banking and Financial Institutions Act 1989 by High Court in Malaya - Whether applicable in Sabah and Sarawak - Whether Lee Hui Jian v. Public Bank Bhd overruled - Banking and Financial Institutions Act 1989, s. 50(1), (3), (4), (6)and (7) - Courts of Judicature Act 1964, s. 7(2) - Federal Constitution, arts. 121(3)* D

The first appellant company was a borrower of the respondent bank under banking facilities which were guaranteed by the other appellants. The respondent filed a suit ('the Kuching suit') in the High Court in Sabah and Sarawak against the appellants to recover sums owing under the banking facilities. In the interim period, the respondent assigned all its rights, assets and liabilities including legal proceedings in relation thereto to CIMB Bank Bhd ('CIMB Bank'). Following the assignment, the respondent bank and CIMB Bank made a joint application to the High Court in Malaya at Kuala Lumpur for a vesting order pursuant to s. 50 of the Banking and Financial Institutions Act 1989 ('BAFIA'). With the vesting order, both the banks applied to substitute the respondent with CIMB Bank as the plaintiff in the Kuching suit. The appellants, on the other hand, applied to strike out the Kuching suit on the grounds that the vesting order was ineffective as it was not applicable in Sabah and Sarawak. The striking out application was based on s. 23(1) of the Courts of Judicature Act 1964 ('CJA') and the case of *Lee Hui Jian v. Public Bank Berhad* [2007] 2 CLJ 551 ('Lee Hui Jian'). In *Lee Hui Jian*, a similar vesting order made under s. 50 BAFIA was held to be effective in Sabah and Sarawak if made by the High Court in Sabah and Sarawak. The learned judge in which this appeal arose held an opposing view to that of the learned judge in *Lee Hui Jian*, namely, that the vesting order was applicable throughout Malaysia inclusive E F G H I

of Sabah and Sarawak. The order for substitution was granted and the striking out application was dismissed. The appellants now appealed to the Court of Appeal. *(Note: Their subsequent appeal to the Federal Court is at p 630 of this CLJ issue.)*

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) Section 23(1) CJA was not intended to regulate the efficacy of a vesting order. It did not exclude the operation of an order made by one court in the local jurisdiction of another court. In other words, s. 23(1) did not exclude the operation in Sabah and Sarawak of the vesting order made by the High Court in Malaya at Kuala Lumpur. The efficacy or effect of the orders of the two High Courts *viz* the High Court in Malaya and the High Court in Sabah and Sarawak (see art. 121(1) of the Federal Constitution ('the Constitution') and s. 3 CJA) were provided in s. 50(1), (3), (4), (6), (7) BAFIA, s. 7(2) CJA and art. 121(3) of the Constitution. Although s. 50(1), (3), (4), (6) and 7 BAFIA were considered in *Lee Hui Jian*, s. 7(2) and art. 121(3) were not given consideration. (para 20)

(2) The intention of the law expressed in s. 50(1), (3), (4), (6) and (7) BAFIA was to regulate the application of a vesting order and to facilitate the effectual transfer of the whole or part of the business, assets, rights and liabilities from the predecessor bank to the successor bank, and not to set up obstacles to stand in the way of substantial justice. (para 21)

(3) In determining whether the vesting order was effective in Sabah and Sarawak, the expressions "a joint application to the High Court" and "such application" in s. 50(1) BAFIA assumed a special significance. Those two expressions envisaged the making of a single application to one High Court only, and the vesting order made pursuant to the application would have effect throughout the whole of Malaysia. (para 23)

(4) Section 50(3) BAFIA provided for the mechanism of vesting the assets and business of one entity in the other by the making of one order of the High Court. The vesting order shall have effect according to its terms "... notwithstanding anything in any law or in any rule of law ..." as enacted in the relevant portion. (para 24)

(5) Section 50(4) BAFIA provided for the vesting order to be published in not less than two daily newspapers in Malaysia. That was clearly intended to give nationwide publicity to the vesting order and to give nationwide effect to it. Had it been intended to be effective only in certain parts of Malaysia, *eg*, either in Malaya or Sabah and Sarawak only, then there would have been no reason to stipulate or ensure publication in Malaysia as a mandatory requirement. Further, s. 50(6) contained mandatory provisions which were applicable by way of "an order of the High Court", *ie*, one and the same order. Section 50(7) not only empowered the vesting order to cover property or business outside Malaysia, but also specified how, after a vesting order had been made, effect might be given to that order or how it could be enforced either by way of reciprocal enforcement of judgments between Malaysia and the foreign country, territory or place outside Malaysia, or in accordance with the law of the foreign country, territory or place. (paras 26, 27 & 29)

(6) The fact that the vesting order enabled the transfer of the business and assets of the respondent to CIMB Bank pursuant to one single application filed in the High Court in Malaya at Kuala Lumpur for the purpose of giving effect to the vesting exercise to the whole of Malaysia was further accentuated by s. 7(2) CJA and art. 121(3) of the Constitution. Section 7(2) CJA contained mandatory provisions prescribing that orders issued or made by the authority of the High Court respecting any cause or matter within its jurisdiction, *eg*, the vesting order shall have full force and effect throughout Malaysia. Article 121(3) of the Constitution clearly provided for any order or judgment to have full force and effect according to its terms throughout all the territories constituting the Federation, *ie*, Malaya, Sabah and Sarawak. It also enabled federal law to provide for one High Court to act in aid of the other. (paras 30, 31 & 37)

(7) The vesting order was effectual in transferring the business of the respondent located in any part of Malaysia to CIMB Bank and was effective throughout the whole of Malaysia. It followed that the decision in *Lee Hui Jian* fell into error and was overruled. The High Court decision was correct and affirmed. (paras 38 & 39)

Bahasa Malaysia *Translation Of Headnotes*

Syarikat perayu pertama telah meminjam dari bank responden di bawah satu kemudahan bank yang dijamin oleh perayu-perayu yang lain. Responden telah memfail guaman di Mahkamah Tinggi Sabah dan Sarawak terhadap perayu-perayu bagi mendapat kembali jumlah yang terhutang di bawah kemudahan ('guaman Kuching'). Dalam pada itu, responden telah menyerahhakkan semua hak, aset serta liabilitinya, termasuk segala prosiding berkaitan, kepada CIMB Bank Bhd ('CIMB Bank'). Ekoran serahanhak tersebut, bank responden dan CIMB Bank telah membuat permohonan bersama di Mahkamah Tinggi Malaya di Kuala Lumpur bagi mendapatkan perintah letakhak di bawah s. 50 Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA'). Dengan perintah letakhak tersebut, kedua-dua bank kemudian memohon untuk menggantikan responden dengan CIMB Bank sebagai plaintif dalam guaman Kuching. Perayu-perayu, sebaliknya, memohon untuk membatalkan guaman Kuching atas alasan bahawa perintah letakhak tidak berkesan kerana tidak terpakai kepada Sabah dan Sarawak. Permohonan untuk membatal tersebut diasaskan kepada s. 23(1) Akta Mahkamah Kehakiman 1964 ('CJA') dan juga kes *Lee Hui Jian v. Public Bank Berhad* [2007] 2 CLJ 551 ('*Lee Hui Jian*'). Di dalam *Lee Hui Jian,* satu perintah letakhak yang serupa yang dibuat di bawah s. 50 BAFIA telah diputuskan sebagai berkesan di Sabah dan Sarawak jika ianya dibuat oleh Mahkamah Tinggi Sabah dan Sarawak. Yang arif hakim di mana rayuan di sini berbangkit mengambil pandangan yang bertentangan dengan Yang arif hakim di dalam kes *Lee Hui Jian*, iaitu, bahawa perintah letakhak terpakai ke seluruh Malaysia termasuk Sabah dan Sarawak. Maka perintah penggantian telah dibenarkan dan permohon untuk membatal telah ditolak. Perayu-perayu kini merayu ke Mahkamah Rayuan. *(Nota: Rayuan mereka seterusnya ke Mahkamah Persekutuan dilaporkan pada ms 630 isu CLJ ini)*.

Diputuskan (menolak rayuan)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 23(1) CJA tidak diniatkan untuk mengawalselia keberkesanan sesuatu perintah letakhak. Ia tidak menghalang suatu perintah yang dibuat oleh sebuah mahkamah dari beroperasi dalam bidangkuasa tempatan sebuah mahkamah lain. Dengan lain perkataan, s. 23(1) tidak menghalang satu perintah letakhak yang dibuat oleh Mahkamah Tinggi Malaya

di Kuala Lumpur dari beroperasi di Sabah dan Sarawak. Soal keberkesanan atau kesan perintah-perintah yang dibuat oleh kedua-dua Mahkamah Tinggi, iaitu Mahkamah Tinggi Malaya dan Mahkamah Tinggi Sabah dan Sarawak (lihat fasal 121(1) Perlembagaan Persekutuan ('Perlembagaan') dan s. 3 CJA) ada diperuntukkan di dalam s. 50(1), (3), (4), (6), (7) BAFIA, s. 7(2) CJA dan fasal 121(3) Perlembagaan. Walaupun s. 50(1), (3), (4), (6) dan 7 BAFIA dikupas oleh *Lee Hui Jian*, namun s. 7(2) dan fasal 121(3) telah tidak dipertimbangkan.

(2) Niat undang-undang seperti yang terungkap dalam s. 50(1), (3), (4), (6) dan (7) BAFIA adalah untuk mengawalselia pelaksanaan suatu perintah letakhak dan membantu pemindahan berkesan keseluruhan atau sebahagian perniagaan, aset-aset, hak-hak serta tanggungan-tanggungan dari bank terdahulu kepada bank pengganti, dan bukannya untuk meletak sekatan bagi menghalang keadilan substantial.

(3) Dalam menentukan sama ada perintah letakhak berkesan di Sabah dan Sarawak, ekspresi "satu permohonan bersama ke Mahkamah Tinggi" dan "permohonan sedemikian" di dalam s. 50(1) BAFIA mempunyai kepentingannya yang tersendiri. Kedua-dua ekspresi ini membayangkan pengemukaan permohonan tunggal ke satu Mahkamah Tinggi sahaja, dan perintah letakhak yang dibuat atas permohonan itu terpakai ke seluruh Malaysia.

(4) Seksyen 50(3) BAFIA memperuntukan mekanisma bagi perletakhakkan aset-aset serta perniagaan sesebuah entiti kepada entiti yang lain melalui pembuatan satu perintah oleh Mahkamah Tinggi. Perintah letakhak tersebut mempunyai kesan menurut terma-termanya "... notwithstanding anything in any law or in any rule of law ..." seperti yang digubal dalam bahagian yang relevan tersebut.

(5) Seksyen 50(4) BAFIA memperuntukkan supaya perintah letakhak disiarkan sekurang-kurangnya di dalam dua suratkhabar tempatan Malaysia. Ini jelas bertujuan untuk memberi seluas-luas publisiti kepada perintah letakhak dan supaya ianya sampai ke seluruh pelusuk negara. Sekiranya ia diniatkan hanya untu berkesan di wilayah-wilayah tertentu sahaja, contohnya di Malaya atau Sabah dan Sarawak sahaja, maka tiada sebab mengapa terdapat peruntukan mandatori supaya penyiarannya dibuat bagi seluruh Malaysia. Selain itu, s. 50(6) mengandungi peruntukan mandatori yang boleh

dilaksanakan melalui "satu perintah Mahkamah Tinggi", iaitu, perintah yang satu dan sama. Seksyen 50(7) tidak hanya memperkuasakan perintah letakhak untuk merangkumi hartanah atau perniagaan di luar Malaysia, tetapi juga mengkhususkan bagaimana ianya berkesan selepas perintah letakhak itu dibuat, atau bagaimana ianya boleh dikuatkuasakan sama ada melalui pelaksanaan timbal balik penghakiman antara Malaysia dan negara-negara atau kuasa-kuasa atau wilayah-wilayah luar, atau mengikut undang-undang negara-negara atau kuasa-kuasa atau wilayah-wilayah luar tersebut.

(6) Fakta bahawa perintah letakhak membolehkan pemindahan perniagaan dan aset-aset responden kepada CIMB Bank berdasarkan satu permohonan tunggal yang difailkan di Mahkamah Tinggi Malaya di Kuala Lumpur bagi maksud memberi kesan kepada pelaksanaan letakhak ke seluruh Malaysia juga ditekankan oleh s. 7(2) CJA dan fasal 121(3) Perlembagaan. Seksyen 7(2) CJA mengandungi peruntukan mandatori yang menetapkan bahawa perintah-perintah yang dikeluarkan atau dibuat di bawah kuasa Mahkamah Tinggi mengenai sebarang kausa atau perkara dalam bidangkuasanya, contohnya perintah letakhak hendaklah mempunyai kuatkuasa dan kesan sepenuhnya di seluruh Malaysia. Fasal 121(3) Perlembagaan jelas memperuntukkan bahawa mana-mana perintah atau penghakiman hendaklah mempunyai kuatkuasa atau kesan sepenuhnya menurut terma-termanya ke atas keseluruhan wilayah-wilayah yang membentuk Persekutuan, iaitu Malaya, Sabah dan Sarawak. Ia juga membolehkan undang-undang persekutuan memperuntukkan sebuah Mahkamah Tinggi untuk bertindak bagi pihak Mahkamah Tinggi yang lain.

(7) Perintah letakhak berkesan memindahkan perniagaan responden kepada CIMB Bank walau di mana jua ia terletak di Malaysia dan berkuatkuasa di seluruh Malaysia. Ianya mengikut bahawa keputusan dalam *Lee Hui Jian* khilaf dan dengan itu ditolak. Keputusan Mahkamah Tinggi adalah betul dan dipersahkan.

Case(s) referred to:

Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 HC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***

Faridah Begum Abddullah v. Sultan Hj Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah [1996] 2 CLJ 159 SC ***(refd)***

Lee Hui Jian v. Public Bank Bhd [2007] 2 CLJ 551 HC ***(refd)***
Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***
PhileoAllied Bank (M) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(refd)***
PP v. Mohd Noor Jaafar [2006] 1 CLJ 103 CA ***(refd)***
Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd [2003] 2 CLJ 671 HC ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 50(1), (3), (4), (6), (7)
Courts of Judicature Act 1964, ss. 7(2), 23(1)(a), (b), (c), (d)
Federal Constitution, art. 121(1), (3)
Rules of the High Court 1980, O. 14, O. 15 r. 7(2)

For the appellants - James Lo; M/s George Lo & Partners
For the respondent - Sim Hui Chuang (Lim Lip See with him); M/s Reddi & Co

[Appeal from High Court, Kuching; Suit No: 22-612006-I]

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing JCA:

Introduction

[1] On 15 June 2007, the learned judge of the High Court in Sabah and Sarawak at Kuching dismissed the summons in chambers of, *inter alia*, the first, third and fourth defendants (collectively "the defendants") who sought to strike out the plaintiff's writ and statement of claim. Meanwhile, the High Court allowed the plaintiff's summons in chambers for substitution.

[2] On 28 January 2008, we dismissed the defendants' appeal with costs.

[3] Our grounds are given below.

A **Factual Background**

[4] Pantai Bayu Emas Sdn. Bhd, the first defendant, is a borrower of the plaintiff, Southern Bank Berhad ("Southern Bank") under banking facilities guaranteed by three guarantors, two of whom are Wu Sui Look and Kuek Swee Ho, the third and fourth defendants respectively.

[5] Southern Bank had filed a suit in the High Court in Sabah and Sarawak at Kuching ("the Kuching suit") against the first defendant and the guarantors to recover the amounts owing under the banking facilities.

[6] By an agreement entered into between Southern Bank and CIMB Bank Bhd ("CIMB Bank"), Southern Bank assigned to CIMB Bank all its rights, assets and liabilities including all legal proceedings. Following such assignment, Southern Bank and CIMB Bank made a joint application to the High Court in Malaya at Kuala Lumpur, pursuant to the Banking and Financial Institutions Act 1989 ("BAFIA"), and obtained a vesting order on 6 September 2006 ("the vesting order").

[7] Based on the vesting order, Southern Bank and CIMB Bank made an application in the Kuching suit for substitution of Southern Bank by CIMB Bank as the plaintiff ("the substitution application").

[8] The defendants then filed an application to strike out the Kuching suit ("the striking out application") on the grounds that:

(1) the vesting order is incompetent to effect the transfer of Southern Bank's claim to CIMB Bank; and

(2) CIMB Bank does not have the requisite *locus standi* in the Kuching suit.

[9] Both the aforesaid applications revolve around the legal effect of the vesting order.

[10] The High Court:

(1) granted the order for substitution; and

(2) dismissed the striking out application.

Legal Effect Of Vesting Order

[11] Defendants' learned counsel Mr. James Lo relied on s. 23(1) of the Courts of Judicature Act 1964 ("CJA") and *Lee Hui Jian (f) v. Public Bank Bhd* [2007] 2 CLJ 551 HC, to support his contention that the plaintiff has no *locus standi* as the vesting order made by the High Court in Malaya at Kuala Lumpur under s. 50 of BAFIA is ineffectual in transferring to and vesting in CIMB Bank all Southern Bank's rights, assets and liabilities in Sarawak.

[12] Plaintiff's learned counsel, Mr. Sim Hui Chuang (Mr. Lim Lip See with him) disagreed, and referred to:

(1) Section 50(1), (3), (4), (6) and (7) of BAFIA;

(2) *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131 CA;

(3) *PhileoAllied Bank (M) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 HC;

(4) *Standard Chartered Bank Malaysia Bhd v. Eden Enterprises (M) Bhd* [2003] 2 CLJ 671 HC;

(5) Section 7(2) CJA; and

(6) Article 121(3) of the Federal Constitution

[13] From the above submissions, we identify the question for determination in this appeal as follows:

> Is the vesting order made under s. 50 of BAFIA ("s. 50") by the Kuala Lumpur branch of the High Court in Malaya effectual in transferring to and vesting in CIMB Bank all Southern Bank's rights, assets and liabilities throughout all the territories of Malaysia *viz.* Malaya, Sabah and Sarawak?

[14] Two judges sitting separately in the High Court in Sabah and Sarawak have the occasion to consider the above question. They have apparently given two divergent views. By the advent of the instant appeal, the responsibility is now reverted to this court to resolve these divergent views.

[15] In *Lee Hui Jian (f) supra*, a similar vesting order made under s. 50 was considered by Linton Albert J of the High Court in Sabah and Sarawak at Sibu. The question for determination was formulated as follows:

A Simply put, the question to be determined was whether the vesting order given by the High Court in Malaya at Kuala Lumpur was competent to effect the transfer of the Finance Company's business to and vest it in the Plaintiff to clothe it with the requisite *locus standi,* bearing in mind the fact that the Hire
B Purchase Agreement was entered into in Sibu, Sarawak and so were the subject matter and the parties to the Hire Purchase Agreement.

[16] His Lordship held that:

C (1) the vesting order given by the High Court in Malaya at Kuala Lumpur must of necessity be ineffectual in transferring to the plaintiff the Finance Company's business, assets and liabilities in Sibu, Sarawak; and

D (2) the vesting order could only have been effectual if it had been made by the High Court in Sabah and Sarawak.

[17] We note that in *Lee Hui Jian, supra,* the learned judge had recognized the jurisdiction of the High Court in Malaya at Kuala Lumpur to make the vesting order, but was unable to sustain the
E extent and applicability of the vesting order beyond the territorial jurisdiction of the High Court in Malaya. Reference was made to s. 50; and the relevant portions of s. 23(1)(a), (b), (c) and (d) of CJA, which are reproduced as follows:

F 23. Civil jurisdiction – general

(1) … the High Court shall have **jurisdiction to try all civil proceedings where:**

(a) the cause of action arose;

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(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

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(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court …

[18] A diametrically opposite view was given in the judgment which is now the subject matter of the instant appeal. Clement
I Skinner J of the High Court in Sabah and Sarawak at Kuching held that the vesting order is effectual to transfer and vest in

CIMB Bank all Southern Bank's rights, assets and liabilities in any part of Malaysia including all legal proceedings involving Southern Bank to CIMB Bank throughout the whole of Malaysia.

[19] It is abundantly clear to us that the correctness or otherwise of the decision in *Lee Hui Jian, supra*, depends on whether s. 50; and s. 23(1) CJA have been correctly applied by the learned judge there.

[20] We shall consider s. 23(1) CJA first. We note that s. 23(1) deals with the "jurisdiction to try", which in turn is founded on certain jurisdictional facts specifically stated in para (a) to (d) therein. Section 23(1) does not deal with nor is it intended to regulate the efficacy of a vesting order. It does not in any way exclude the operation of an order, made by one High Court, in the "local jurisdiction" of another High Court. In other words, s. 23(1) does not exclude the operation, in Sabah and Sarawak, of the vesting order made by the High Court in Malaya at Kuala Lumpur. The efficacy or effect of the orders of the two High Courts, *viz* the High Court in Malaya; and the High Court in Sabah and Sarawak (see art. 121(1) of the Federal Constitution, and s. 3 CJA), are provided in s. 50(1), (3), (4), (6) and (7) BAFIA; s. 7(2) CJA and art. 121(3) of the Federal Constitution. Although s. 50(1), (3), (4), (6) and (7) BAFIA had been considered in *Lee Hui Jian, supra*, s. 7(2) and art. 121(3) had not been. These written laws require more elaborate consideration now.

[21] In our judgment, the intention of the law expressed in s. 50(1), (3), (4), (6) and (7) as a whole is to regulate the application for a vesting order and to facilitate the effectual transfer of the whole or part of the business, assets, rights and liabilities from the predecessor bank to the successor bank, and not to set up obstacles to stand in the way of substantial justice.

[22] By way of amplification, so far as material, s. 50(1) provides as follows:

> …, the licensed institution whose business is to be transferred (hereinafter referred to as "the transferor") and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as "the transferee") may make **a joint application to the High Court** by way of an *ex parte* originating summons for such order of the Court as may be required by

A them to facilitate or enable the agreement or arrangement being given effect to, and in such application there may be sought all or any of the following orders: (emphasis added).

[23] In determining whether the vesting order is effectual in Sabah and Sarawak, the expressions "a joint application to the High Court" and "such application" in s. 50(1) assume a special significance. In our view, these two expressions envisage the making of a single application to one High Court only, and the vesting order made pursuant to the application would have effect throughout the whole of Malaysia.

[24] Section 50(3) provides for the mechanism of vesting the assets and business of one entity in the other by the making of one order of the High Court. The vesting order shall have effect according to its terms "notwithstanding anything in any law or rule of law" as enacted in the following relevant portion:

> (3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, ..., then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee ..., and **the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law,** and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings. (emphasis added).

[25] The expression "notwithstanding anything in any law or in any rule of law" ("the expression") in s. 50(3) has received extensive exposition and explanation in several authorities. By way of illustration:

(1) In *Leong Moh Sawmill Co Sdn Bhd (In Liquidation), supra*, the axis of the dispute is whether a foreign bank, the Standard Chartered Bank ("the predecessor bank") can continue to pursue matters relating to foreclosure proceedings in its name after it had already sold all its banking business in Malaysia to Standard Chartered Bank Malaysia Bhd ("the successor bank") pursuant to a vesting order made under s. 50(1). In view of the expression in s. 50(3), Siti Norma Yaakob, JCA (later CJ(M)) held, *inter alia*, as follows:

(a) the vesting order was such that there was no requirement for a formal order of substitution under O. 15 r. 7(2) of the Rules of the High Court 1980;

(b) the successor bank was deemed to be a party in all proceedings initiated by or commenced against the predecessor bank; and

(c) the transfer of any property or business pursuant to the vesting order shall on and from the transfer date become vested in or held by the transferee ie a transmission of interest from one legal entity to another.

(2) *Leong Moh Sawmill Co Sdn Bhd (In Liquidation), supra*, was followed by me in *PhileoAllied Bank, supra*, which also concerns foreclosure proceedings. The chargor there sought an order that the chargee's originating summons be struck out or stayed until the registered charge had been registered in the name of Malayan Banking Bhd (the successor bank) and contended that the chargee had failed to comply with the order vesting the plaintiff's properties in the successor bank. I had no difficulty in dismissing the defendant's objection and held that:

(a) The vesting order is all encompassing; and

(b) The expression in s. 50(3) allows the foreclosure proceedings to continue without the necessity of substituting the successor bank as the plaintiff, or transferring and registering the registered charge in the name of the successor bank, and is intended to clearly and unambiguously take overriding precedence over the National Land Code 1965;

and

(3) In *Standard Chartered Bank Malaysia Bhd, supra,* the Standard Chartered Bank, (the predecessor bank) agreed to give the defendant banking facilities. The plaintiff is the successor bank under s. 50. On the defendant's default, the successor bank sued for and obtained, from the registrar, summary judgment under O. 14 of the Rules of the High Court 1980 for the outstanding debt. On appeal to judge in chambers, Selventhiranathan J also followed *Leong Moh Sawmill Co Sdn. Bhd (In Liquidation), supra,* and held, *inter ali*a, that:

A (a) The defendant's contention that the vesting order was *ultra vires* BAFIA was a non-issue, in view of the clear provisions of BAFIA, particularly s. 50(3) providing for the non-challengeability of the vesting order made under s. 50(1); and

B (b) BAFIA is enabling in nature and not prohibitory in that it makes possible the transfer of the predecessor bank's business in Malaysia to the successor bank in a single application to the High Court, thereby obviating the need C for a piecemeal transfer of the assets and liabilities related to the business.

[26] Next, s. 50(4) provides for the vesting order to be published in not less than two daily newspapers in Malaysia. This is clearly intended to give nationwide publicity to the vesting order and to D give nationwide effect to it. Had it been intended to be effective only in certain parts of Malaysia eg, either in Malaya or Sabah and Sarawak only, then there would have been no reason to stipulate or ensure publication in Malaysia as a mandatory requirement thereunder. E

[27] Further, s. 50(6) contains mandatory provisions which are applicable in all the territories of Malaysia *viz* Malaya, Sabah and Sarawak, by way of "an order of the High Court" ie one and the same order. For completeness, s. 50(6) merits reproduction as F follows:

> (6) Where **an order of the High Court** under subsection (1) vests any alienated land, or any share or interest in any alienated land, in the transferee:
>
> G (a) **The High Court shall,** where such alienated land is in West Malaysia, pursuant to s. 420(2) of the National Land Code, cause a copy of the order to be served on the Registrar of Titles or the Land Administrator, as the case may be, immediately after the making of the order so that the H Registrar of Titles or the Land Administrator, as the case may be, gives effect to the provisions of the said s. 420(2), (3) and (4);
>
> (b) **Where such alienated land is in Sabah**, the transferee shall, as soon as practicable after the order has been made, I present an authenticated copy of such order to the Registrar for registration of the vesting of the alienated land or of the share or interest in alienated land as provided under the Land Ordinance of Sabah; or

(c) **Where such alienated land is in Sarawak,** the transferee shall, as soon as practicable after the order has been made, produce an authenticated copy of such order to the Registrar for the registration of the vesting of the alienated land or of the share or interest in alienated land, in the transferee, as provided under s. 171 of the Land Code of Sarawak.

[28] Section 50(7) travels the extra miles beyond our shores and provides as follows:

(7) **An order of the High Court** under subsection (1) **may relate to any property or business of the transferor outside Malaysia** and, if it so relates, effect may be given to it either in accordance with any reciprocal arrangements relating to **enforcement of judgments** that may exist between Malaysia and **the country, territory or place outside Malaysia in which such property or business is,** or where there are no such arrangements, in accordance with the law applicable in such country, territory or place.

[29] Section 50(7) not only empowers the vesting order to cover property or business outside Malaysia, but also specifies how, after a vesting order has been made, effect may be given to that order or how it could be enforced either by way of reciprocal enforcement of judgments between Malaysia and the foreign country, territory or place outside Malaysia; or in accordance with the law of the foreign country, territory or place.

[30] Our view that the vesting order enables the transfer of the business and assets of Southern Bank to CIMB Bank pursuant to one single application filed in the High Court in Malaya at Kuala Lumpur, for the purpose of giving effect to the vesting exercise in Malaysia as a whole, is further accentuated by s. 7(2) CJA and art. 121(3) of the Federal Constitution.

[31] Section 7(2) contains mandatory provisions prescribing that orders issued or made by the authority of the High Court respecting any cause or matter within its jurisdiction, eg, the vesting order, shall have full force and effect throughout Malaysia, as seen in these words:

7. Process of Courts

(2) All writs, summonses, warrants, orders, rules, notices, and other processes whatsoever, whether civil or criminal, issued or made by the authority of the Court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.

[32] Section 7(2) has indeed further acquired an elevated status in the constitutional domain by way of an equipollent provision. It has been enshrined in the supreme law of our land ie the Federal Constitution, in which art. 121(3) declares as follows:

> (3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

[33] The intention and implication of art. 121(3) may be determined by reference to the relevant principles of constitutional interpretation.

[34] In *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah CJ (now HRH the Sultan of Perak), speaking for a panel of five judges of the Federal Court at p. 32, concisely set out the principles of interpreting a constitution in the following words:

> In interpreting a constitution, two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way with less rigidity and more generosity than other Acts (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21). A constitution is *sui generis* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms. The principle of interpreting constitutions 'with less rigidity and

more generosity' was again applied by the Privy Council in *AG of St. Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129 at p. 136.

[35] These principles were applied by Mohd Azmi FCJ (as he then was) in *Faridah Begum bte Abddullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah* [1996] 2 CLJ 159 SC; and also by me in *Dato' Hari Menon v. Texas Encore LLC & Ors* [2005] 2 CLJ 688 HC; and *PP v. Mohd. Noor Jaafar* [2006] 1 CLJ 103 HC.

[36] In *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481, the Court of Appeal through the judgment of Gopal Sri Ram, JCA further expounded the following principles:

(1) Generally speaking, the rules of construction that guide a court in the interpretation of ordinary statutes apply with equal force when interpreting the Federal Constitution. But there are important differences. For, the Federal Constitution, unlike any ordinary statute, does not merely declare the law. It creates and regulates the law making power of the federation. It also creates and defines the various branches of government. It confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers. Or as Lord Diplock put it in *Attorney-General of the Gambia v. Momodou Jobe* [1984] AC 689 at p. 700:

> A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

(2) A court, while rendering a broad and liberal construction to the language employed by the Federal Constitution, is not entitled 'to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors'. (Per Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR [1939] FC 1.) This general rule is, however, subject to an important qualification. Where the language of the constitution is open to two constructions, a court should adopt the construction 'which will ensure the smooth and harmonious working of the constitution and eschew the other

A which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory'. (Per Shelat and Grover JJ in *Kesavananda Bharati v. The State of Kerala* AIR [1973] SC 1461 at p. 1581). Thus, a court, for the purpose of rendering a
B harmonious interpretation, is entitled to make implications into the language of the constitution. An implication here refers to something that 'explain, perhaps limits, the effect of what is expressed'. (Per Windeyer J in *Victoria v. Commonwealth* [1971] 122 CLR 363 at p. 401). (See also *Mohd. Noor bin Jaafar, supra*).

C

[37] Upon applying the above principles of constitutional interpretation, we are of the view that art. 121(3) clearly provides for any order or judgment to have full force and effect according to its terms throughout all theterritories constituting the
D federation ie Malaya, Sabah and Sarawak. It also enables federal law to provide for one High Court to act in aid of the other.

Conclusion

[38] On the foregoing grounds, we hold that the vesting order is
E effectual in transferring the business of Southern Bank located in any part of Malaysia to CIMB Bank and is effective throughout the whole of Malaysia. The answer to the above question for determination is therefore in the affirmative.

F **[39]** Hence, with the utmost respect, we hold that the decision in *Lee Hui Jian, supra,* has fallen into error and is overruled. The decision against which this appeal arises is correct and is hereby affirmed.

G **[40]** In the circumstances, the defendant's appeal is dismissed with costs. The High Court orders dismissing the defendants' application, and allowing the plaintiff's application for substitution are affirmed. Deposit to the plaintiff on account of taxed costs.

[41] My learned colleagues Zainun bt. Ali, and Hasan bin Lah,
H JJCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.

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